No. 05-1126

In the Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL., PETITIONERS

v.

WILLIAM TWOMBLY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether alleged parallel conduct, together with a conclusory allegation of conspiracy, is sufficient to state a claim under Section 1 of the Sherman Act, 15 U.S.C. 1.

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INTEREST OF THE UNITED STATES

The Department of Justice, along with the Federal Trade Commission, has responsibility for enforcing the federal antitrust laws, through which it seeks to further "our fundamental national economic policy" of competition. *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 372 (1963). The antitrust laws also provide for enforcement by private parties to serve the same end. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-131 (1968). Meritorious private antitrust suits provide an important check against harmful anticompetitive conduct. Meritless antitrust suits, however, do not serve that end. To the contrary, if not promptly dismissed, they create economic inefficiencies, chill procompetitive conduct, and act as a drain on the economy because they force parties either to expend substantial resources to defend themselves or to succumb to *in terrorem* settlement demands. The United States ac-

cordingly has a substantial interest in the proper standard for allowing antitrust suits to move past the motion-to-dismiss stage.

STATEMENT

This case involves allegations that petitioners, four telecommunications companies, conspired in violation of Section 1 of the Sherman Act with resulting injury, compensable by treble damages, to nearly everyone in the continental United States. Section 1 makes unlawful "[e]very contract, combination * * *, or conspiracy, in restraint of trade or commerce." 15 U.S.C. 1. The question presented is what a complaint must allege with respect to the asserted "contract, combination * * *, or conspiracy" in order to state a "claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

1. Respondents brought a putative class action against petitioners alleging, *inter alia*, violation of Section 1 of the Sherman Act.[1] The charged conspiracy allegedly arose in response to the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56. According to the complaint, the 1996 Act places obligations upon incumbent local exchange carriers (ILECs), including petitioners, to provide potential competing local exchange carriers (CLECs) access and connections to their lines and equipment in order to "promote competition in local exchange markets across the country," J.A. 18 (¶ 32), in exchange for being permitted to enter the long-distance telephone market. J.A. 18-19 (¶ 30).

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[1] The proposed class consists of all persons and entities residing in the continental United States (except Alaska) who are or were subscribers of local telephone service or high speed internet services since February 8, 1996, except for petitioners, those affiliated with them, and any judge assigned to the case. J.A. 28 (¶ 53).

Based on "information and belief pursuant to the investigation of counsel," J.A. 10, the complaint alleges that petitioners "entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them." J.A. 11 (¶ 4); see J.A. 27 (¶ 51).[2] In particular, the complaint alleges that petitioners "engaged in parallel conduct in order to prevent competition" from CLECs, including failing to provide the same quality of service to competitors that petitioners provided to their own retail customers, failing to provide access to their operational support systems on a nondiscriminatory basis that places competitors at parity, and refusing to sell to competitors, on just, reasonable, and nondiscriminatory terms, access to components of their networks on an unbundled basis. J.A. 23-26 (¶ 47).

The complaint also alleges that petitioners "refrained from meaningful head-to-head competition in each other's markets." J.A. 21 (¶ 39). The complaint alleges that this failure to compete with one another "would be anomalous in the absence of an agreement," J.A. 21 (¶ 40), given that petitioners' predominance in their respective territories would provide "substantial competitive advantages" in contiguous territories, J.A. 21-22 (¶ 41), and presented "an especially attractive business opportunity," J.A. 21 (¶ 40). In support of the allegation that petitioners were forgoing "lucrative opportunities," J.A. 22 (¶ 43), the complaint quotes an executive of one petitioner as stating that entry into another ILEC's ter-

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[2] Only two paragraphs of the complaint—those regarding respondents' claims "as to themselves and their own actions"—set forth allegations that are based on respondents' "own knowledge." J.A. 10.

ritory "might be a good way to turn a quick dollar but that doesn't make it right." J.A. 22 (¶ 42).

The complaint further alleges that the conspiracy began "at least as early as February 6, 1996" and has continued thereafter, J.A. 30 (¶ 64); petitioners communicated at unspecified meetings of a "myriad of organizations," J.A. 23 (¶ 46); petitioners had motive to conspire, J.A. 26-27 (¶ 50); and petitioners engaged in substantial conduct in furtherance of the conspiracy, J.A. 23-26 (¶ 47). The complaint does not, however, set forth direct support for the existence of any actual agreement between petitioners. See Pet. App. 31a (noting that "the amended complaint does not identify specific instances of conspiratorial conduct or communications").

2. The district court dismissed the complaint for failure to state a claim. Pet. App. 35a-58a. The court recognized that "there is no special pleading standard for conspiracy." *Id.* at 42a. Moreover, while noting that a conspiracy under the Sherman Act may be inferred from "parallel business behavior that suggest[s] an agreement," the court cautioned that "'conscious' parallelism" is not sufficient. *Id.* at 41a (quoting *Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954)). The court observed that "similar market actors with similar information and economic interests will often reach the same business decisions." *Ibid.* Accordingly, the court concluded that "simply stating that defendants engaged in parallel conduct, and that this parallelism must have been due to an agreement, would be equivalent to a conclusory, 'bare bones' allegation of conspiracy," and therefore insufficient to state a claim. *Id.* at 42a.

Applying those general principles, the court considered whether respondents had alleged facts "suspicious

enough to suggest that [petitioners] are acting pursuant to a mutual agreement rather than their own individual self-interest." Pet. App. 46a. The court held that the complaint's allegations provide "no reason to believe that [petitioners'] parallel conduct was reflective of any agreement." *Id.* at 58a. The court concluded that the alleged "behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory." *Id.* at 48a. And, although it noted that petitioners' alleged failure to enter each others' markets presented a "closer question," *id.* at 50a, the court concluded that certain assumptions on which the complaint's theory rested were "severely undermined" by other alleged facts, *id.* at 51a, such that the complaint did not allege facts raising an inference of conspiracy, *id.* at 57a.

Respondents filed a notice of appeal, without seeking leave to replead their claims. See J.A. 4-5.

3. The court of appeals vacated and remanded, Pet. App. 2a-34a, concluding that the district court had applied the wrong legal standard. *Id.* at 10a. The court of appeals acknowledged that "a barebones statement of conspiracy * * * without any supporting facts permits dismissal." *Id.* at 16a (quoting *Heart Disease Research Found.* v. *General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972)). But the court held that a complaint alleging a violation of Section 1 is sufficient if the "pleaded factual predicate" includes conspiracy among "the realm of 'plausible' possibilities." *Ibid.* In the court's view, a complaint can suffice by "a pleading of facts indicating parallel conduct by the defendants." *Id.* at 25a. The court stated that such allegations would be insufficient only if "there is no set of facts that would permit a plaintiff to

demonstrate that the particular parallelism asserted was the product of collusion." *Ibid.*

Applying its legal standard, the court of appeals concluded that the complaint's factual allegations were sufficient, at least at the pleading stage, and that they provided petitioners with sufficient notice of respondents' claim. Pet. App. 30a-33a. With respect to the allegation that petitioners conspired to keep CLECs from entering their respective markets, the court relied upon the complaint's allegations that petitioners had ample opportunity to communicate with one another and a common incentive to conspire. *Id.* at 32a. With respect to the allegation that petitioners conspired not to enter one another's markets as CLECs, the court relied upon the complaint's allegations that, although petitioners had an economic incentive to enter the geographic areas that each surrounded, none had meaningfully done so. *Id.* at 31a.[3]

SUMMARY OF ARGUMENT

A. The Federal Rules of Civil Procedure provide that a complaint must set forth a claim showing that the plaintiff is entitled to relief, and require that the complaint provide fair notice to the defendant of the nature of the plaintiff's claim and the grounds upon which the claim is based. To meet those criteria, a complaint must allege, at a minimum, a sufficient factual predicate to provide meaningful notice to the defendant and to demonstrate a reasonable basis for inferring that the alleged conduct may be wrongful. The allegations, in other

[3] The court of appeals stated in a footnote that respondents appeared to be able to plead that petitioners had engaged "in parallel conduct against their self-interest," which the court noted was a "'plus factor' that, if proved at trial, can support the inference of collusion necessary for a jury finding of conspiracy." Pet. App. 32a-33a n.15. But the decision below did not turn on that supposition.

words, must provide a "reasonably founded hope" that the discovery process will reveal relevant evidence to support the claim. *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005). Whether the factual predicate alleged is sufficiently concrete to warrant further proceedings turns on the applicable substantive law. Conclusory assertions regarding crucial elements of the plaintiff's case do not suffice.

Moreover, the extent of the factual predicate necessary to give the defendant "fair notice" depends on the context and complexity of the case. Although minimal factual allegations may suffice to apprise a defendant of the plaintiff's claim in a simple case, it is essential that a district court "retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983). Otherwise, a plaintiff could tie up significant judicial and other resources, and potentially force a substantial settlement, even though it alleges a vague and "largely groundless claim." *Dura Pharms.*, 544 U.S. at 347.

B. Those principles demand more than mere allegations of parallel conduct and conclusory allegations of an agreement or conspiracy in the context of a complex antitrust suit. To be sure, evidence of parallel conduct may at times provide important circumstantial evidence supporting an inference of agreement in a suit alleging a violation of Section 1 of the Sherman Act. But parallel conduct is to be expected even in fully competitive markets and, standing alone, provides an insufficient basis for inferring an illegal agreement. Moreover, a conclusory assertion of a conspiracy or agreement does not suffice to convert allegations of parallel conduct into a

sufficient claim of a Section 1 violation. Because an agreement is the critical factor distinguishing innocuous parallel conduct from a Section 1 violation, courts must insist on more than mere conclusory allegations of that element. The court of appeals' standard—which would appear to require nothing more than allegations of parallel conduct and a conclusory allegation of conspiracy—is clearly insufficient.

C. Although the question is a close one, the complaint here is insufficient under proper application of Rule 8 pleading standards. At bottom, the complaint merely alleges two types of parallel business conduct, together with a conclusory assertion of an agreement. With respect to petitioners' alleged actions to prevent entry into their respective markets by CLECs, those actions were (as respondents conceded) entirely consistent with each individual petitioner's economic self-interest, and the complaint alleged no factual predicate sufficient to suggest that such behavior was the result of collusion. With respect to petitioners' alleged failure to enter each others' markets as CLECs, the complaint does assert that such parallel lack of entry would be "anomalous in the absence of an agreement." But the complaint offers nothing but conclusory assertions in support of that statement, and the facts actually alleged in the complaint indicate nothing anomalous about that parallel inaction. In the end, the complaint fails to provide petitioners with fair notice of either the basis or theory of respondents' claim and is insufficient to give rise to a reasonably grounded expectation that discovery will reveal relevant evidence of an illegal agreement.

ARGUMENT

ALLEGED PARALLEL CONDUCT, TOGETHER WITH A CONCLUSORY ALLEGATION OF CONSPIRACY, IS INSUFFICIENT TO STATE A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT

The court of appeals adopted a legal standard that treats allegations of parallel conduct, accompanied by a conclusory allegation of an agreement, as sufficient to state a violation of Section 1 of the Sherman Act for purposes of surviving a motion to dismiss. That legal standard is wrong and has the potential to chill substantial economic activity that is both efficient and innocuous from the standpoint of the antitrust laws. The standard fails to account for an important aspect of substantive antitrust law and misapplies the law of pleading.

As a matter of substantive antitrust law, it has long been clear that mere parallel conduct, even consciously parallel conduct, does not violate Section 1. See, *e.g.*, *Theatre Enters., Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954). Indeed, such conduct is commonplace and often efficient. Of course, parallel conduct can result from an agreement between competitors, and such an agreement could violate Section 1. But an allegation of agreement under Section 1 must rest on something more than allegations of parallel conduct, lest commonplace and efficient economic behavior provide a sufficient basis for costly litigation over largely groundless claims.

Nor can a mere conclusory allegation of an agreement or conspiracy suffice to convert allegations of parallel conduct into an adequate allegation of a violation of Section 1. It is well established that conclusory allegations of wrongful conduct are insufficient. The requirements

of Rule 8 are not demanding. But they do require the plaintiff to allege sufficient facts to put the defendant on fair notice of the claims and to demonstrate a reasonable basis for inferring that the defendant may have engaged in wrongful conduct, or as the Court put it in *Dura Pharmaceuticals*, a "reasonably founded hope that the [discovery] process will reveal relevant evidence" sufficient to establish the plaintiff's claim. 544 U.S. at 347. In the context of a Section 1 claim, those standard pleading rules require more than allegations of parallel conduct, with or without a conclusory allegation of an agreement or conspiracy. Although it is a close case, applying that standard to the complaint at issue here, the district court was correct to dismiss the complaint.

A. A Complaint Must Allege Facts Providing Fair Notice To The Defendant And Demonstrating A Reasonably Grounded Expectation That Discovery Will Yield Evidence To Support The Plaintiff's Claim Of Wrongful Conduct

Rule 8 of the Federal Rules of Civil Procedure requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To be sure, that requirement is "not meant to impose a great burden upon a plaintiff." *Dura Pharms.*, 544 U.S. at 347. But this Court has made clear that the requirement is a meaningful one, and that it serves several significant purposes.

To satisfy Rule 8(a)(2), a complaint must meet two fundamental criteria. First, it must "set forth a claim upon which relief could be granted." *Conley* v. *Gibson*, 355 U.S. 41, 45 (1957). Second, it must give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47. A complaint cannot fulfill those criteria without alleging sufficient

facts to provide concrete notice of the alleged wrongdoing and, putting conclusory allegations to one side, a reasonable basis for inferring that there may be wrongful conduct, *i.e.*, to demonstrate a "reasonably founded hope that the [discovery] process will reveal relevant evidence" sufficient to establish the plaintiff's claim. *Dura Pharms.*, 544 U.S. at 347 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975)).

Thus, while Rule 8(a)(2) does not require factual allegations to be set out "in detail," see *Conley*, 355 U.S. at 47, it does require sufficient facts to provide fair notice and to give rise to a reasonably grounded expectation that discovery will produce relevant evidence to support the claims. See *Dura*, 544 U.S. at 347; *DM Research, Inc.* v. *College of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999) (complaint must set forth "a *factual* predicate concrete enough to warrant further proceedings"). In the absence of direct and non-conclusory allegations on every material point, the complaint "must contain allegations from which an inference fairly may be drawn by the district court that evidence on these material points will be available and introduced at trial." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216, at 220-227 (3d ed. 2004). Otherwise, a plaintiff with "a largely groundless claim" would be permitted to "simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Dura Pharms.*, 544 U.S. at 347; see *DM Research*, 170 F.3d at 55 (observing that alleging a sufficient factual predicate is "the price of entry, even to discovery").

Whether a complaint contains allegations sufficient to provide fair notice and to demonstrate a reasonable basis for inferring that the defendant may have engaged in

wrongful conduct must be measured against the substantive legal standards applicable to that claim. See, *e.g.*, *Dura Pharms.*, 544 U.S. at 341-342. Especially when a particular element critically distinguishes innocuous (or, indeed, desirable) conduct from wrongdoing, allegations concerning that element must be concrete, rather than conclusory. A complaint's allegations also must be judged in the context of the particular case. "Whether a statement of a claim is sufficient to give fair notice depends in part on the complexity of the case." 2 James Wm. Moore et al., *Moore's Federal Practice* § 8.04[1][a], at 8-24.1 (3d ed. 2006). Thus, as this Court has observed, in cases of "magnitude," a district court "must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors*, 459 U.S. at 528 n.17. Moreover, in allegations of misconduct by large corporations, it is reasonable to insist on something more than vague allegations concerning the corporate principal.

In short, "the appropriate level of generality for a pleading depends on the particular issue in question or the substantive context of the case before the court." 5 Wright & Miller, *supra*, § 1218, at 273. That is not a "heightened pleading" standard, but is simply a recognition that, under ordinary pleading requirements, not all federal pleadings "are intended to exhibit the same degree of specificity." *Id.* § 1221, at 290.[4]

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[4] In *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), the Court suggested that such a context-specific inquiry under Rule 8 is not the same as requiring a heightened pleading standard. In that case, the defendants contended that "the degree of factual specificity required of a complaint by the Federal Rules of Civil Procedure varies according to the complexity of the underlying substantive law." *Id.* at 167. The Court did not reject

Thus, in *Dura Pharmaceuticals*, this Court measured the plaintiffs' securities-fraud allegations against the applicable substantive law, which requires proof that the defendants proximately caused economic loss to the plaintiffs. Against that standard, the Court held that the complaint fell short of ordinary pleading requirements. 544 U.S. at 346-348. Although the complaint did allege that plaintiffs suffered "damage[s]" caused by paying "artificially inflated prices," *id.* at 347, it provided no factual allegations regarding "what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentation," *ibid.* In holding that complaint insufficient, the Court considered the potential magnitude of the case, and the policies behind the securities laws, which sought in part to prevent "'abusive' practices including 'the routine filing of lawsuits . . . with only a faint hope that the discovery process might lead eventually to some plausible cause of action.'" *Ibid.* (quoting H.R. Conf. Rep. No. 369, 104th Cong., 1st Sess. 31 (1995)).

As demonstrated by the *Dura Pharmaceuticals* Court's rejection of the plaintiffs' bare allegation of "damage[s]," conclusory assertions regarding crucial elements of a plaintiff's case are not sufficient to provide fair notice or to demonstrate a reasonably grounded expectation that discovery will produce evidence to sustain the plaintiff's claim. Rather, a district court can properly insist on "some specificity in pleading." *Associated Gen. Contractors*, 459 U.S. at 528 n.17. That is particu-

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that principle, but instead ruled against the defendants because it concluded that the court of appeals had not applied the standards of Rule 8, but had instead created a "heightened pleading" standard specifically for civil rights claims alleging municipal-liability under Section 1983 of Title 42. *Id.* at 167-168.

larly true when that element critically distinguishes between innocuous and unlawful conduct. Furthermore, although a court must take all of the "well-pleaded factual allegations in the complaint as true," and construe them "in the light most favorable" to the plaintiff, *Papasan* v. *Allain*, 478 U.S. 265, 283 (1986), a court is "not bound to accept as true a legal conclusion couched as a factual allegation," *id.* at 286.

This Court has repeatedly confirmed the principle that conclusory allegations are insufficient to meet a pleader's burden under Rule 8. In *Papasan*, the Court disregarded plaintiffs' allegation that they had been "deprived of a minimally adequate education" because the plaintiffs "allege[d] no actual facts in support of their assertion." See 478 U.S. at 286 (noting that plaintiffs did not allege "that schoolchildren * * * are not taught to read or write" or "that they receive no instruction on even the educational basics"). Similarly, in *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006), although the plaintiff alleged that the defendants' racketeering acts were "aimed at 'gain[ing] sales and market share at [the plaintiff's] expense" and succeeded in giving the defendants a "competitive advantage" over the plaintiff, *id.* at 1994-1995, the Court held that the complaint was insufficient to allege proximate causation. See 126 S. Ct. at 1996-1998. The Court looked beyond the bare allegations that the plaintiff had "suffered its own harms" as a result of the defendants' actions to consider whether the underlying factual allegations supported a violation of the applicable substantive law. *Id.* at 1997-1998.[5]

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[5] All of the courts of appeals are in agreement that conclusory allegations should be disregarded. See, *e.g.*, *Aponte-Torres* v. *University of P.R.*, 445 F.3d 50, 55 (1st Cir. 2006) ("We ought not * * * credit 'bald assertions, unsupportable conclusions, periphrastic circumlocu-

This Court's decision in *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002), is not to the contrary. In *Swierkiewicz*, the Court rejected the assertion that "a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of dis-

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tions, and the like.'"); *Cantor Fitzgerald, Inc.* v. *Lutnick*, 313 F.3d 704, 709 (2d Cir. 2002) ("'[W]e give no credence to plaintiff's conclusory allegations.'"); *Morse* v. *Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) ("[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss."); *Jordan* v. *Alternative Res. Corp.*, No. 05-1485, 2006 WL 2337333, at *10 (4th Cir. Aug. 14, 2006) (stating that "we have rejected reliance on similar conclusory allegations" at the pleading stage); *United States ex rel. Bain* v. *Georgia Gulf Corp.*, 386 F.3d 648, 654 (5th Cir. 2004) ("'[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'"); *Mezibov* v. *Allen*, 411 F.3d 712, 716 (6th Cir. 2005) (same), cert. denied, 126 S. Ct. 1911 (2006); *Fries* v. *Helsper*, 146 F.3d 452, 457 (7th Cir.) ("[M]ere conclusory allegations of a conspiracy are insufficient to survive a motion to dismiss."), cert. denied, 525 U.S. 930 (1998); *Farm Credit Servs. of Am.* v. *American State Bank*, 339 F.3d 764, 767 (8th Cir. 2003) ("[W]e are 'free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.'"); *Woodrum* v. *Woodward County*, 866 F.2d 1121, 1126 (9th Cir. 1989) (stating that "conclusory allegations that [defendants] conspired do not support a claim"); *Tal* v. *Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006) ("Bare bones accusations of a conspiracy without any supporting facts are insufficient to state an antitrust claim."); *Davila* v. *Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir.) ("[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal."), cert. denied, 540 U.S. 1016 (2003); *Browning* v. *Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) ("[W]e accept neither 'inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint,' nor 'legal conclusions cast in the form of factual allegations.'"); *Bradley* v. *Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998) ("Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim.").

crimination under the framework set forth by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973)." *Id.* at 508. The Court explained that the *McDonnell Douglas* burden-shifting framework is merely one way to establish liability in a discrimination case, not an element of the cause of action, and that "the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Id.* at 511. But the Court nowhere relieved the plaintiff of the requirement to allege a factual predicate sufficient to provide notice and to demonstrate a reasonable basis for inferring that the defendant may have engaged in wrongful conduct.

To the contrary, the *Swierkiewicz* Court emphasized that the "complaint detailed the events leading to [the plaintiff's] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." 534 U.S. at 514. The complaint thus gave sufficient notice in the context of that case, *ibid.*, especially given the simplicity of the issues and the factual allegations suggesting a reasonably grounded expectation that discovery would produce relevant evidence of national origin and age discrimination. See *id.* at 508-509 (noting that the complaint alleged the name of the company officer who had discriminated against the plaintiff, a statement by that officer that he wanted to "energize" the plaintiff's department, and the identity and experience of the less-qualified individual who had been promoted in the plaintiff's place).

As the district court correctly observed, this case is not analogous to a simple employment-discrimination claim, in which the factual predicate is "fairly self-evident" and "the defendant will be apprised of the basic facts, and will know how to defend." Pet. App. 45a. The

complaint alleges a nationwide conspiracy, spanning more than a decade, among four major telecommunications firms with vast numbers of employees. In a case of this immensity—with its wide array of potentially relevant witnesses who might or might not have been involved in the alleged conspiracy, and the sweeping geographic and temporal scope of the allegations—the factual predicate is anything but self-evident, and the complaint fails to provide concrete notice of the alleged wrongdoing. Given that such a case involves a "potentially massive factual controversy," more "specificity in pleading" is required. *Associated Gen. Contractors*, 459 U.S. at 528 n.17. There are countless different factual predicates that could hypothetically sustain a far-reaching conspiracy claim, and a plaintiff therefore must provide a factual predicate that is sufficient to give the defendant notice of the theory of the plaintiff's claim. See *Dura Pharms.*, 544 U.S. at 347 (holding that, in a complex securities-fraud case, the complaint must "provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind"). A conclusory allegation that somewhere along the line there was an unlawful agreement does little to provide concrete notice or sufficient allegations of wrongdoing that can be tested through discovery.[6]

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[6] The sample form complaints attached to the Federal Rules demonstrate that the specificity required of the factual allegations turns on the nature of the particular claim. The forms for certain simple actions (*e.g.*, Fed. R. Civ. P. App. Form 5 for Goods Sold and Delivered) suggest the need for fewer factual allegations than the forms for more complex actions (*e.g.*, Fed. R. Civ. P. App. Form 17 for Infringement of Copyright and Unfair Competition). But all of the forms include factual predicates sufficient, in the context of the particular legal claim at issue, to provide the defendant with fair notice of the grounds upon which the claim rests and to demonstrate that the plaintiff has a reasonably

Moreover, in deciding whether a complaint's allegations are sufficient to create the requisite reasonably grounded expectation of establishing a claim, it is "not * * * proper to assume that [the plaintiff] can prove facts that it has not alleged." *Associated Gen. Contractors*, 459 U.S. at 526. The Federal Rules allow liberal amendment of pleadings, and a plaintiff who can cure a deficient complaint generally has an opportunity (and an obligation) to do so to avoid dismissal. See Fed. R. Civ. P. 15; *Associated Gen. Contractors*, 459 U.S. at 526 n.11.

To be sure, the Court has stated that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. But that statement cannot mean, as the court of appeals apparently thought (Pet. App. 25a), that a complaint is sufficient as long as the allegations in the complaint do not themselves foreclose relief. Otherwise, that statement would preclude dismissal even of totally conclusory complaints that provide virtually no factual predicate for the alleged injury. Instead, the "set of facts" that might be proved must actually be alleged in the complaint, or at least be fairly inferred from facts so alleged. See *Associated Gen. Contractors*, 459 U.S. at 526. Thus, in *Dura Pharmaceuticals*, although the Court acknowledged the possibility of factual scenarios under which the purchase of securities at inflated prices would lead to an economic loss, 544 U.S. at 343, it did not assume that the plaintiffs could prove one of those scenarios, because the plaintiffs had merely alleged "damage[s]" caused by paying "artificially inflated prices," without identifying or implying any viable theory by

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grounded expectation of uncovering relevant evidence to prove its claim through discovery.

which loss causation might actually be established. *Id.* at 343, 347-348. Likewise, in *Papasan*, although the plaintiffs alleged that they had been "deprived of a minimally adequate education," the Court concluded that assertion was insufficient given the lack of any concrete factual allegations to support it. 478 U.S. at 286.

At bottom, Rule 8 should be "construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. In the context of the complex and wide-ranging antitrust conspiracy alleged here, that mandate cannot be met unless Rule 8 requires respondents to allege a factual predicate that is sufficiently concrete to provide meaningful notice of the alleged wrongdoing and a reasonable basis for inferring that the alleged conduct may be wrongful, *i.e.*, in this context, may reflect an agreement.

B. An Allegation Of Parallel Conduct Is Not By Itself Sufficient To Allege An Agreement In Violation Of Section 1 Of The Sherman Act

1. To prove a violation of Section 1 of the Sherman Act, a plaintiff must establish, among other things, the existence of an agreement. 15 U.S.C. 1. The plaintiff may establish an agreement either through direct evidence or by inference from circumstantial evidence. Proof of parallel conduct by the alleged conspirators can be relevant in proving an illegal conspiracy by means of circumstantial evidence. See *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984); see also 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1410, at 60 (2d ed. 2003).

It is well established, however, that "proof of parallel business behavior" does not "conclusively establish[] agreement" and that "such behavior itself" does not

"constitute a Sherman Act offense." *Theatre Enters.*, 346 U.S. at 541. Even "conscious parallelism" is "not in itself unlawful." *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). A plaintiff who seeks to establish an agreement through circumstantial evidence and allegations of parallel conduct thus cannot survive a motion for summary judgment without producing evidence that "'tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (quoting *Monsanto*, 465 U.S. at 764).

That is so because parallel action is a hallmark of competitive markets. As firms compete, they spur each other to reduce prices, increase quality, and offer more and better services, following the most efficient business models. As less efficient firms lose sales, the market often is left with firms with similar cost structures that offer similar products and services at similar prices. And as underlying costs change, prices in the market may rise and fall in parallel. Firms may adopt the same practices because they are the most reliable, the most efficient, the most familiar to customers, or the most clearly in compliance with a regulatory regime. See, *e.g.*, Donald F. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658-659, 681 (1962). Moreover, firms in a regulated industry may react to common regulatory incentives in similar ways. 6 Areeda & Hovenkamp, *supra*, ¶ 1425, at 168 (noting that one nonconspiratorial explanation for parallel conduct is that "[e]ach actor may simply have responded in an obviously reasonable way to a common external stimulus"). In short, parallel action is common and by itself raises *no*

reasonable inference of conspiracy. See *id.* ¶ 1410, at 60 ("[T]here is no basis for inferring any kind of agreement from * * * mere parallel behavior."); *id.* ¶ 1417(g), at 115 ("Mere parallelism * * * is widely present, especially in perfectly competitive markets, and is not itself a compelling subject for legal control.").

Parallel *inaction* is even less suggestive of illicit agreement. In particular, "parallel decisions by business firms not to enter new markets create no such inference." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 307d, at 155 (Supp. 2006). "Firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." *Ibid.* Thus, drawing inferences from what a business fails to do is a problematic exercise; one can analyze the harms and benefit of an action as a discrete matter, but the number of territories a business does not enter or products it does not offer is virtually infinite. Even the most vigorous rivals will end up not competing in some respects.

Accordingly, factual allegations indicating only that defendants engaged in parallel conduct, without more, cannot be treated as sufficient. Nor can such a complaint be saved by adding an unadorned allegation of the existence of a "conspiracy" or an "agreement." Although an agreement is the hallmark of a Section 1 conspiracy, it is also the only thing that divides perfectly lawful parallel behavior from an unlawful conspiracy to restrain trade. Thus the bare allegation of an agreement, with or without alleged instances of parallel conduct, is not enough. Like the allegation of being "deprived of a minimally adequate education" in *Papasan*, such an allegation is little more than a legal label in the context of a Section 1 claim, unless there are allegations of "actual facts in sup-

port of [the] assertion." 478 U.S. at 286. As Chief Judge Boudin has explained, "terms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation * * * but a court is not required to accept such terms as a sufficient basis for a complaint." *DM Research*, 170 F.3d at 56. It is one thing to allege a specific agreement between particular representatives of companies at a specific time and place, but a mere allegation of an agreement to engage in parallel action or inaction stands on a different footing. And adding detailed allegations about parallel conduct, which absent an agreement would not violate the antitrust laws, simply does not add up to a well-pleaded complaint under Rule 8(a)(2), because once the conclusory allegation is properly disregarded, the complaint fails to "set forth a claim upon which relief could be granted." *Conley*, 355 U.S. at 45.

Moreover, as the district court here recognized, see Pet. App. 45a, such a complaint fails to give the requisite "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. "[A] plaintiff's factual and economic theory of a conspiracy is not evident from a conclusory allegation of conspiracy, and there is simply no way to defend against such a claim without having some idea of how and why the defendants are alleged to have conspired." Pet. App. 45a. District courts must retain the authority to enforce the requirement of fair notice, which has particular force in cases of the complexity and magnitude of most class-action antitrust suits, see *Associated Gen. Contractors*, 459 U.S. at 528 n.17, such as the "far-reaching" claims at issue here, Pet. App. 5a.

That is not to say that a complaint asserting a claim under Section 1 of the Sherman Act must allege facts

that would be sufficient to defeat summary judgment under the standard articulated in *Matsushita Electric*. 475 U.S. at 588. No special rules of pleading apply to antitrust cases, and accordingly there is no absolute requirement that a complaint alleging an antitrust conspiracy must be dismissed unless it alleges facts sufficient to establish the so-called "plus factors" that would ultimately be required to prove the existence of an illegal agreement by means of circumstantial evidence. Cf. *Swierkiewicz*, 534 U.S. at 510-511 (holding that a plaintiff need not allege, at the pleading stage in an employment discrimination case, a prima facie case under the *McDonnell Douglas* burden-shifting framework).

Although there are no special pleading rules for antitrust cases, the very fact that parallel conduct can provide circumstantial evidence of an agreement, yet absent an agreement such conduct is commonplace and innocuous (indeed, often efficient), calls for careful parsing of a Section 1 complaint. A Section 1 complaint must allege, at a minimum, facts providing concrete notice of the claimed wrongdoing and some objectively reasonable basis for inferring that an unlawful agreement may explain the parallel conduct. See *Dura Pharms.*, 544 U.S. at 347. A plaintiff should not be allowed to exact the societal costs inherent in pursuing a complex antitrust case based on "a largely groundless claim." *Ibid.* Thus, the proper standard requires sufficient factual allegations to demonstrate at least a reasonably grounded expectation that discovery will reveal evidence of an illegal agreement. *Ibid.* Such allegations might include, for example, circumstances relating to the timing of events such as particular jointly attended meetings that by their nature and context tend to suggest an agreement, or to the in-

volvement of the alleged conspirators in joint activities during reasonably specified periods of time.

2. The court of appeals did not apply the proper pleading standard in this case. The court recognized that a well-pleaded Section 1 complaint must allege, in addition to the existence of a conspiracy, a "sufficient supporting factual predicate on which that allegation is based." Pet. App. 25a. But the court believed that allegations of parallel conduct, standing alone, could supply such a predicate: "a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy." *Ibid.* (citing *Nagler* v. *Admiral Corp.*, 248 F.2d 319, 325 (2d Cir. 1957)). In the view of the court of appeals, such allegations were sufficient unless "there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence," *ibid.*, a standard that the court of appeals apparently understood to mean that dismissal is inappropriate as long as it is possible to *hypothesize* factual circumstances, *not* alleged or suggested in the complaint, under which liability could exist.

Under that standard, virtually any complaint that points to instances of parallel conduct would be sufficient, because the existence of an agreement to engage in that conduct nearly always would provide one possible explanation for the parallel conduct. In essence, the court of appeals' standard allows improper assumptions that the plaintiff "can prove facts that it has not alleged," *Associated Gen. Contractors*, 459 U.S. at 526, because mere allegations of parallel conduct do not create a sufficient basis to infer the existence of an agreement. Parallel conduct is often economically efficient and is commonplace. If alleging such common and innocuous conduct,

with or without an accompanying conclusory allegation of agreement, is a sufficient basis for discovery, there is a risk of chilling substantial efficient economic activity. As this Court cautioned in evaluating the sufficiency of another antitrust complaint, such "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *Matsushita*, 475 U.S. at 594).

The court of appeals' standard perversely risks turning a sign of healthy competition into a green light for strike suits and *in terrorem* settlement demands. Indeed, the court of appeals acknowledged the harmful effects of its standard, noting "the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." Pet. App. 30a.

The court of appeals mistakenly believed that it was helpless to avoid those harms. Pet. App. 30a. In reality, the careful application of ordinary pleading principles recognized by this Court, with appropriate cognizance of the fine line that separates unlawful agreements from innocuous parallel conduct, provides ample basis for insisting upon fair notice, disregarding conclusory allegations, and requiring that pleadings set forth factual allegations that are sufficient to give rise to a reasonably grounded expectation that discovery will reveal relevant evidence to support the claim.

C. The Complaint In This Case Is Insufficient

While presenting a close question, the complaint here ultimately fails to state a claim under the proper application of Rule 8 pleading principles. To be sure, the complaint makes a bare assertion of an agreement between identified companies to restrain trade. J.A. 27 (¶ 51). But that is simply "a legal conclusion couched as a factual allegation," *Papasan*, 478 U.S. at 286, which the complaint seeks to draw "in light of" its other allegations. J.A. 27 (¶ 51). When the conclusory assertions elsewhere in the complaint are disregarded, as they must be, and the complaint is reduced to the factual allegations actually pleaded, the complaint is insufficient. Properly construed, the complaint does not give rise to a reasonably grounded expectation that discovery will reveal relevant evidence to support respondents' Sherman Act claim, and it fails to provide the requisite fair notice to petitioners of the basis for that claim.

The complaint alleges a single, two-pronged conspiracy based entirely upon "information and belief." J.A. 10; see note 2, *supra*. First, the complaint alleges that each petitioner engaged in a number of "wrongful" measures to impede the entry of CLECs into their respective markets. See J.A. 23-26 (¶ 47). Those measures include failing to provide the same quality of service to petitioners' competitors as to their own retail customers, failing to provide CLECs access to their operational support systems on a nondiscriminatory basis, and refusing to sell unbundled-network elements to CLECs on just, reasonable, and nondiscriminatory terms. *Ibid.*

Those allegations of parallel conduct, standing alone, create no reasonable inference that the conduct was the result of collusion between petitioners. As respondents

conceded in the district court, "it is in each ILEC's individual economic interest to attempt to keep CLECs out of its market." Pet. App. 48a (citing 08/01/03 Hearing Tr. 29 (J.A. 100)).[7] And, as the district court explained, "since the ILECs are similar firms with similar information and interests, they could rationally expect that each of them will reach the same conclusions as to the course of action that best suits their interests." *Id.* at 49a.

The court of appeals (Pet. App. 32a) nevertheless concluded that those allegations were sufficient, because respondents also alleged that petitioners had opportunities to conspire through industry organizations at unspecified times through unspecified persons, J.A. 23 (¶ 46), and a common motive to do so because such a conspiracy would mutually reinforce their respective efforts to prevent competition in their own territories, J.A. 26 (¶ 50). But an abstract opportunity and some incentive to conspire almost always exists among competitors, so alleging such a truism does nothing to create a reasonably grounded expectation that discovery will reveal that petitioners agreed to do what is conceded to be in their self-interest in any event. In the absence of more specific allegations, the complaint is inadequate to place petitioners on fair notice of the grounds upon which respondents' claim rests.

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[7] Even if an ILEC's unilateral failure to assist a rival telecommunications carrier violates the Telecommunications Act of 1996, that violation does not alone establish a violation of Section 2 of the Sherman Act. See *Verizon Commc'ns Inc.*, 540 U.S. at 407-408. Moreover, the fact that the 1996 Act independently forbids some of the alleged conduct may reflect an assumption that, absent those statutory prohibitions, it would be in the ILEC's economic self-interest to limit CLEC access. Of course, an agreement among ILECs to refuse such assistance likely would violate Section 1 of the Sherman Act.

The charged conspiracy's second prong—that petitioners have acted in parallel to refrain from meaningful entry into other petitioners' territories—comes closer to satisfying Rule 8, but it too falls short. As noted, parallel conduct, standing alone, creates no inference of collusion; parallel inaction is even less likely to be the result of an agreement. See Areeda & Hovenkamp, *supra*, ¶ 307d, at 155. The court of appeals (Pet. App. 31a-32a) concluded that the allegations were sufficient, however, because the complaint also alleges that entry by an ILEC as a CLEC into a neighboring ILEC's territory would be "an especially attractive business opportunity," J.A. 21 (¶ 40), because the entering ILEC would have "substantial competitive advantages." J.A. 21 (¶ 41). The complaint supports its assertion that entering as a CLEC would be a "lucrative" business opportunity, J.A. 22 (¶ 43), by quoting one ILEC executive as stating that it "might be a good way to turn a quick dollar but that doesn't make it right," J.A. 22 (¶ 42).

The complaint does not identify the "substantial competitive advantages," however, and elsewhere suggests that they would be illusory, see p. 3, *infra*. Moreover, the complaint's assertion that entry into another ILEC's territory as a CLEC was likely to be "lucrative" was supported only by a statement of an ILEC executive that was taken out of context. As the district court explained (Pet. App. 56a), the article in which the statement was reported makes clear that the executive viewed competing as a CLEC to be a poor long-term business proposition. See J.A. 42 (quoting same executive as stating that "I don't think it's a sustainable economic model"). The complaint nowhere alleges that entry as a CLEC would have been more profitable than other business opportunities available to petitioners. In fact, statements by the

same executive suggest that other business opportunities were more attractive to ILECs. J.A. 42 (noting that ILEC "Qwest does compete to provide data and long-distance service to large Chicago-based businesses").

In short, the assertions in the complaint that petitioners' parallel lack of entry into each others' markets was "anomalous in the absence of an agreement," J.A. 21 (¶ 40), are similar to the allegation this Court disregarded in *Papasan*. Like the assertion there of having been "deprived of a minimally adequate education," the assertions here may properly be disregarded because the complaint "allege[s] no actual facts in support of [the] assertion[s]." 478 U.S. at 286.

Indeed, as the district court concluded (Pet. App. 51a), the factual allegations contained in the complaint actually undermine the conclusions that the complaint attempts to draw from the alleged parallel lack of entry. Those allegations suggest that the prospect of entering the CLEC business in another ILEC's territory was unlikely to be a successful business opportunity. See J.A. 23-26 (¶ 47) (alleging a variety of ways in which ILECs impeded CLECs, including poor quality service, lack of access to operational support systems and unbundled elements on a non-discriminatory basis, undue delays in the provision of unbundled elements, failure to provide interconnections, refusals to sell services at just and reasonable rates, lack of connections to essential facilities, errors in ILEC billing of CLECs, and slow and inaccurate manual order processing). The district court properly relied on those factual allegations in rejecting the complaint's conclusory statements, because a complaint can plead too much as well as too little and must be judged by the facts actually alleged, not by facts that

could be assumed but are not alleged. See *Associated Gen. Contractors*, 459 U.S. at 526.

At bottom, the factual allegations set forth in the complaint amount to no more than a pleading of parallel conduct in an industry with a regulatory scheme that imposed similar requirements on the ILECs, which in turn made such parallel conduct particularly likely. Although the complaint seeks to infer an "agreement" from that otherwise innocuous conduct, it contains no factual allegations sufficient to create a reasonably grounded expectation that discovery will uncover evidence of such an agreement. *Dura Pharms.*, 544 U.S. at 347. Nor were the allegations sufficient to provide "fair notice" to petitioners of the basis of respondents' claim or the theory on which it was based, given the breadth and scope of the charged conspiracy. Accordingly, the district court correctly demanded more specificity before allowing this "potentially massive factual controversy to proceed." *Associated Gen. Contractors*, 459 U.S. at 528 n.17.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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